THE OLIGARCHY OF THE SENATE.

BY A. MAURICE LOW.

OVER the doors of the Senate of the United States might well be inscribed the motto, *"Do ut des,"* for it expresses the principle which governs the members of the Senate, especially the inner circle that really controls the Upper House of Congress, that is, in fact, the government of the United States. Bismarck translated this maxim and used it in the sense of "I give in order that you may give;" Mr. Goschen rendered it into English as "the exchange of friendly offices, based on the avowed self-interest of the parties." Whether the Bismarckian or the Goschen version be accepted, the result is the same.

The founders of the Republic, while creating all possible precautions against the usurpation of the Executive, could not altogether close their eyes to the dangers which might come from legislative assumptions. Madison wrote that the founders of the Republic "seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." And again: "It is against the enterprising ambition of this department [the legislative] that the people ought to indulge all their jealousy and exhaust all their precautions." Hamilton pointed this warning: "The tendency of the legislative authority to absorb every other has been fully displayed and illustrated by example in some preceding number. . . . The representatives of the people . . . often appear disposed to exert an imperious control over the other departments."

Curiously enough—curiously, that is, in the light of to-day's events—the encroachment of the House of Representatives was more feared than that of the Senate. In No. 53 of the *Federalist* this admonitory language is used:

"A few members [of the House of Representatives], as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them. This remark is no less applicable to the relation which will subsist between the House of Representatives and the Senate."

And again, in No. 58 of the same publication, this caution against the danger of encroachment on the part of the House was addressed to the people of New York:

"Notwithstanding the equal authority which will subsist between the two houses on all legislative subjects, except the originating of money bills, it cannot be doubted that the House, composed of the greater number of members, when supported by the more powerful States, and speaking the known and determined sense of a majority of the people, will have no small advantage in a question depending on the comparative firmness of the two houses."

"But quitting the dim light of historical research," to use Madison's illuminating phrase, and studying the present situation by the broad glare of recent history, it may be asked: Has the House of Representatives passed the limits which rightfully belong to it, or has the Senate absorbed powers that, in the belief of the framers of the Constitution, are properly vested in the other co-ordinate branches of the government?

Basing the Federal Constitution on the British system, *mutatis mutandis,* the framers of the Constitution might well regard the House as having higher authority than the Senate, because it had the sole power to originate money bills. While that is technically correct, the power of the Senate over money bills is, in some respects, even greater than that of the House, since it is able to amend any bill which the House may send to it for concurrent action. This was the very thing feared by Mason, of Virginia, and pointed out by him; and the right of the Senate to originate, by the power of amendment, bills raising revenue and making appropriations has been confirmed by judicial approval. Technically, such bills have not originated, or rather have not been initiated, in the Senate. But when the Senate takes, for example, a tariff bill, strikes out all except the enacting clause, writes in and returns to the House a new bill, which that body is compelled to accept, it may be asked whether that particular law providing for the collection of revenue has not been created, that

is to say, originated, by the Senate, in defiance of the seventh section of the first article of the Constitution, despite the permission given to the Senate to propose amendments. That which is *res adjudicata* is no longer open to question. But one may safely hazard the opinion that none of the framers of the Constitution in discussing this clause of that instrument anticipated a day when a tariff bill framed by the House would be treated with contemptuous indifference by the Senate, and a tariff bill framed by the Senate would become the law of the land. But the fact is greater than the opinion. By the power of the Senate to amend, the preponderating control supposed to have been secured to the House by endowing it with the sole right to originate money bills, has been effaced. "They, in a word, hold the purse," Hamilton said of the House; but to-day the House holds the purse while the Senate dips into it.

The Senate and the House, therefore, stand on an equal footing, so far as the control of the public purse is concerned, the House having lost the ability to coerce the Senate by withholding supplies because the Senate by "amendment" can defy the House. But the Senate always has the advantage of the House in any contest, because of the fact that it is a small and well-disciplined body, and because of the feeling of superiority which belongs to the Senatorial estate. Objections have been frequently urged against the common use of the term "Upper House" as descriptive of the Senate, on the ground that, the Senate having coordinate and not greater privileges than the House, it is a mistake to give it an appellation that would signify superior authority. Technically, it is true that there is no distinction in the delegated powers, and yet the Constitution itself makes a distinction between the membership of the two Houses, requiring that the Senator shall be possessed of the wisdom that follows from greater age, and the more thorough comprehension of the spirit of the country proceeding from longer citizenship, if of alien birth.

The legislative surrender of the House of Representatives to the Senate began with the election of Mr. Reed to the Speakership of the Fifty-first Congress. Mr. Reed found himself confronted by a state of affairs which needed a drastic remedy. It is only necessary here to refer incidentally to the practice which prevailed in the House of Representatives before Mr. Reed's election

to the Speakership, as the conditions are too well known to the student of current parliamentary history to require more than passing mention. The rules of the House were too feeble to permit the transaction of business unless by unanimous consent or a test of endurance. The minority always had the majority at a disadvantage. It was always possible for the minority to prevent a vote being reached simply by offering dilatory motions, or by breaking a quorum; in the one case time was consumed in calling the roll, in the other nothing could be done until the sergeant-at-arms secured the attendance of a quorum, and it often required several weary hours for the sergeant-at-arms to round up his quarry. Mr. Reed, when he came to the chair, must have had very distinct, and very unpleasant, memories of the bitter contest over the Direct Tax Bill, when for twenty-six consecutive hours the doors of the chamber were kept locked because a call of the House was in progress. If the majority were to be held responsible for legislation, it was only proper that they should have power.

Mr. Reed had the courage and the ability to frame a code of rules that made it possible for the House to conduct business in an orderly and expeditious manner. How absolutely necessary his code was is shown from the fact that his Democratic successor substantially made the Reed rules his own; and, still later, when the swing of the pendulum once more placed the House in control of the Republicans, the Republican majority saw no good reason why any change should be made in the rules. A code that has stood the test of time, that could have been easily altered but was not, that has been approved by political opponents, must possess merit. Mr. Reed's parliamentary services entitle him to the highest gratitude of the country.

Unfortunately, Mr. Reed was a revolutionist; he accomplished with one bold stroke and in a few days what, under other circumstances, would only have been brought about very gradually and after long years of discussion. The danger of a revolution is that it is apt to run to extremes; that instead of moving slowly and naturally along the line of least resistance it takes a short cut to its objective point by employing cataclysmic methods.

But further, not only did Mr. Reed feel it his duty to put an end to interminable and frivolous debate, he also regarded it as incumbent upon him to check the rapidly rising tide of extrava-

gant expenditure. Those were the days when the taunt of "a billion dollar Congress" made men turn pale. A billion dollar budget no longer affrights us.

Two important things followed from the new dispensation. One was that even vital measures were disposed of without proper consideration. When the time arrived for taking a vote the gavel fell, often in the midst of a sentence, and all debate ceased. The other was that members of the House who were unable, because of the Speaker's rigid ideas of economy, to secure appropriations in House bills, accomplished their purpose by inducing Senators to offer for them bills in the Senate in the form of amendments. Senators were not averse to doing this, as it placed Representatives under obligations to them, it increased their prestige in their States, and it added still more to the growing power of the Senate. To such an extent has the practice grown that it is now recognized, as a matter of course, that the Senate will "take care" of routine legislation to which the House is opposed or on which it is not safe to risk the chance of possible defeat in the House. Appropriations for the construction of a revenue cutter, a lighthouse tender, public buildings and other things were made by the Senate at the request of Representatives who knew the impossibility of securing favorable action by the House if the bills originated in the latter body. To preserve its own reputation for economy, the House will wink at the extravagance of the Senate. The Senate, not being so close to the people as the House, is less frightened by the charge of extravagance.

There is no way in which debate in the Senate can be abridged or terminated except by unanimous consent. The state of affairs which existed in the House prior to the election of Mr. Reed to the Speakership exists to-day in the Senate. The majority governs only by the will of the minority. It is true that it does not always suit the purpose of the minority to exercise its power, but the power is latent and not surrendered. We have seen tariff bills "amended" by the Senate so that their framers did not recognize them; we have seen a single Senator compelling a majority to come to terms with him because he threatened to make a speech which it would take six weeks to deliver; we have seen a single Senator defeat a bill carrying an appropriation of some $70,000,000—a bill passed by the House and having a majority in its favor in the Senate—because it suited his purpose so to do.

It is because business in the Senate can only proceed by "unanimous consent" that the principle of *"Do ut des"* governs. A Senator who wants to secure an appropriation must not be too particular about some other Senator's little raid into the Treasury. Even great party measures can be brought to vote only by agreement. That is the reason why, during the course of a session, the *Congressional Record* has frequent mention of these agreements; that is why the announcement is repeatedly made that a vote will be considered as ordered on a certain bill on a definite day and hour, "if there be no objection," and no objection is ever made. A pact once made in the Senate is not broken. It is an agreement between gentlemen.

It has been shown that the Senate has equal power with the House over the control of appropriations; that it can create a tariff bill by the right of amendment; that it can prevent the enactment of any bill passed by the House; that it encourages members of the House to look for legislation in the Senate rather than in the House, where it rightfully belongs. One has never heard of Senators asking favors from Representatives.

To say that the House has been reduced to a negligible quantity in legislation would be an overstatement of the case; it is no exaggeration to say that it has become an insignificant factor. In further support of this assertion let it be said—and no greater practical proof of its correctness could be offered—that the correspondents who represent in Washington the leading newspapers of the country no longer think it necessary to consult members of the House regarding legislation; they confine their attention almost exclusively to the Senate. Time was, not many years ago, when important questions were pending, when the opinions of leaders in the House were as eagerly sought by these correspondents as were the opinions of leaders in the Senate, but to-day the mastery of the Senate is so clearly recognized that it would be a waste of time to seek for information elsewhere. When the important "Platt amendment" was under discussion last spring, scarcely a word was said, either in the newspapers or at the Capitol, about the attitude of the House. The same indifference as to the position of the House was displayed while the question was being argued whether the Philippines were to be governed by Congress or were for the time being to be left in the hands of the President.

Legislation, therefore, in Washington is represented by the Senate. Does the Senate dominate the President?

Superficial observers are always fond of talking of the ease with which the President can control the Senate because he is the fountain head of patronage, unconsciously voicing the fear of Hamilton that "sometimes we are told that this fund of corruption is to be exhausted by the President in subduing the virtue of the Senate." Now, the fact is that the nature of the relations between the President and the Senate is very similar to the character of that *enfant terrible* of our childhood whose virtues and faults have been celebrated in rhyme:

> "When she was good, she was very, very good,
> But when she was bad she was horrid."

Precisely so with the Senate. When President and Senate are on good terms, there is no more amiable legislative body in the world; but when the relations are strained the Senate can be extremely "horrid." Even in its most agreeable mood it constantly gives the President to understand that, while he may propose, the final disposition of measures of consequence rests with it. Allusion has been made to a single Senator defeating a great appropriation bill, and a few words of explanation will not be out of place as illustrating the control which individual Senators exercise over legislation. In the closing hours of the last session of Congress, Senator Carter, of Montana, whose term expired with that Congress and who, therefore, was no longer bound by the obligations of *"Do ut des,"* began a speech against the River and Harbor bill. That bill had already been passed by the House. Mr. Carter's opposition, it was said by some, was prompted by the President, who considered that the appropriation was extravagant; Mr. Carter, it was said by others, opposed the bill because no appropriation had been made to irrigate the arid lands of his own and adjacent States. It is quite immaterial what his motive was. In the closing hours of the night before the session terminated by constitutional limitation, Mr. Carter took the floor and began a semi-serious, semi-humorous speech against the bill. His purpose soon became obvious. Senators interested in the bill fumed and fidgeted; they implored and they even threatened; but Mr. Carter was adamantine. A few minutes before twelve o'clock on the fourth of March, when the session expired, Mr. Carter gracefully yielded the floor, and the bill was decently interred.

These same superficial observers, assuming that Mr. Carter had been instigated by the President, pointed to it as another evidence of the encroaching control of the President over legislation, forgetting that it was only another illustration of Senatorial power. If Mr. Carter could defeat a bill because it was not made up exactly in accordance with his views, why cannot Mr. Carter's successor do the same thing at this or any other session? In fact, he does not even have to exercise his power; it is quite sufficient for him to threaten to use it to gain his point. Mr. Carter has reminded his former colleagues that any Senator can shape any legislative act to accord with his ideas, provided he has the required determination.

There is no more striking example of the encroachment of the Senate than the way in which the Senate deals with appointments and its interference in the conduct of foreign relations. Hamilton dismissed as idle the suggestion that the President's nominations would be overruled, or that the Senate could coerce the President into nominating a particular individual; but Hamilton could not foresee a senatorial oligarchy. Presidential nominations have been frequently rejected; no President now dares to make a nomination unless the Senators from the State in which the nominee resides have given their approval. Fitness, merit, talents are not the conclusive consideration. A man nominated to be a Justice of the Supreme Court of the United States was rejected because he and the Senator from his State, although of the same political faith, had been opposed to each other; the nomination of a man seeking a commission as a paymaster in the army was prevented because this man had written certain things in criticism of a Senator. No nomination is too important or too unimportant to escape this scrutiny. Here again the principle of "*Do ut des*" prevails under the euphonious guise of "senatorial courtesy." A nominee personally distasteful to a Senator must be rejected, because the time may come when some other Senator will ask a similar favor at the hands of his associates.

This is mischievous and, at times, humiliating to the President; but it is seldom dangerous. The interference of the Senate in the conduct of foreign relations and its meddling with diplomatic negotiations are fraught with serious consequences. The Constitution gives the President the power "to make treaties, provided two-thirds of the Senators present concur," which has

been interpreted by some expounders of the Constitution to mean that the Senate may ratify or reject a treaty as it sees fit, but it has not power to amend. This, however, is not the judicial interpretation, and the Supreme Court has decided (Haver *v.* Yaker, 9 Wall. 35) that the Senate is not required to adopt or reject a treaty as a whole, but may modify or amend it. But the Senate has assumed an even more advanced position. It now chooses to regard a treaty as simply "a project." In a letter which Senator Lodge wrote to the Boston *Transcript*, December 29th, 1900, in which he defended the position of the Senate, he used these words: "The Senate is part of the treaty-making power, and treaties sent to it for ratification are not strictly treaties, but projects for treaties; they are still inchoate." This statement, Mr. Lodge observes, is a "constitutional truism." It is in the sense that Mr. Lodge is simply paraphrasing the Constitution when he declares that the Senate is part of the treaty-making power, and he is absolutely correct in declaring that a treaty negotiated by the President is not a consummated compact until ratified by the Senate, but whether the Senate has not encroached upon executive prerogatives cannot be so lightly answered.

As showing the assumption of the Senate, notice the remarkable change made in the wording of a recent treaty. Last year the Senate ratified a treaty with Great Britain (The Tenure and Disposition of Real and Personal Property), providing for the disposition of real estate and giving any British colony the right to adhere to the convention on notice from the British Ambassador at Washington to the Secretary of State; and, similarly, any possessions of the United States beyond the seas were to be included in the compact upon notice "being given by the representative of the United States at London, by direction of the President." The Senate amended this to read "by direction of the treaty-making power of the United States." Thus, by the addition of a few words, the Senate assumed to itself the right to conduct foreign relations, an assumption for which no warrant can be found in the Constitution.

Presidents who were more jealous of their prerogatives than Mr. McKinley have read Congress a sharp lecture for attempting to interfere in foreign affairs. Jackson vetoed an act* because

* An "act to authorize the Secretary of the Treasury to compromise the claims allowed by the commissioners under the treaty with the King of the Two Sicilies, concluded Oct. 14, 1832."

"in my judgment inconsistent with the division of powers in the Constitution of the United States, as it is obviously founded on the assumption that an act of Congress can give power to the Executive or to the head of one of the Departments to negotiate with a foreign government. . . . The Executive has competent authority to negotiate . . . with a foreign government—an authority Congress cannot constitutionally abridge or increase." Would Jackson have permitted the Senate to amend the Property Treaty as McKinley did? Certainly not, as we may infer from the stinging language used in the memorable "Protest" of April 15th, 1834, in which he said:

"The resolution of the Senate presupposes a right in that body to interfere with this exercise of Executive power. If the principle be once admitted . . . the constitutional independence of the Executive Department would be as effectually destroyed and its powers as effectually transferred to the Senate as if that end had been accomplished by an amendment to the Constitution."

Grant was equally jealous that the line of demarcation between the legislative and the executive should not be overstepped. In returning to the House of Representatives a "joint resolution relating to congratulations from the Argentine Republic," which directed the Secretary of State to acknowledge a dispatch of congratulation, Grant said:

"I cannot escape the conviction that their adoption has inadvertently involved the exercise of a power which infringes upon the constitutional rights of the Executive. . . . The Constitution of the United States, following the established usages of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers and in all official communications from them."

After quoting from the act establishing the Department of State, Grant continued:

"This law, which remains substantially unchanged, confirms the view that the whole correspondence of the government with and from foreign states is intrusted to the President; that the Secretary of State conducts such correspondence exclusively under the orders and instruction of the President."

Cleveland had no scruples about making Congress understand that it must not interfere with the conduct of foreign affairs, and that the recognition of an independent state was an executive act purely, and not one with which the legislative branch could concern itself.

Having advanced the doctrine that treaties negotiated by the

President are merely "projects for treaties; they are still inchoate," the Senate has now still further encroached on the Executive by claiming to know the details of a treaty while in process of negotiation and before the treaty is submitted to it for ratification. Minos must be admitted to the secrets of Jove. That, virtually, is what the Senate compelled President McKinley and Secretary Hay to do when it so amended the Hay-Pauncefote canal treaty as to make its acceptance by the British Government impossible. Mr. Hay, instructed by the President to reopen negotiations in the endeavor to secure the assent of the British Government to a new convention, deemed it not only politic but absolutely indispensable that he should consult with leading Senators; that he should inform them of the lines on which he proposed to negotiate the new treaty, and ascertain from them if the suggested stipulations met with their approval. This he did by the direct instruction of President McKinley; not only did he advise with Senators but also with the Vice-President, who is not a member of the Senate and cannot vote on a treaty.

That "perfect *secrecy* and *immediate* dispatch" which Jay held to be "sometimes requisite" are impossible if the Senate must be consulted in advance of negotiations. Jay, who was wise enough to see that there were persons "who would rely on the secrecy of the President, but who would not confide in that of the Senate," thought that the constitutional convention had done well in providing "that although the President must, in forming them [treaties], act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest." This is antiquated doctrine. The modern doctrine makes the President merely the agent of the Senate in framing a treaty.

"The State Department in its negotiations with foreign governments has one hand tied behind its back and a ball and chain about its leg," was the remark made to the writer by a man who has had a long experience in American diplomacy. Jay voiced the fear entertained at the time of the adoption of the Constitution "that two-thirds [of the Senate] will oppress the remaining third," but to-day it is always the one-third that has the power to oppress the remaining two-thirds and the Executive as well. A treaty is always sure to meet with political opposition, the opposition, that is, of the party antagonistic to the President;

or opposition originating in prejudice, self-interest or ignorance. As instances may be cited the defeat of the Olney-Pauncefote general treaty of arbitration (the defeat of which was caused by dislike of Mr. Cleveland and Mr. Olney, and by the general prejudice then existing against the negotiation of a treaty of that character with England); the failure to act affirmatively on the French reciprocity treaty, because it was believed it might injure certain manufacturing interests; the amendments to the Hay-Pauncefote canal treaty, inserted because certain similar amendments were found in the convention on which the new treaty was based, which were perfectly proper in the one and had no place in the other; and also because certain Senators were honest enough to say that they feared the construction of the canal would seriously injure the transcontinental railroads. Every treaty will meet with opposition from one or all of these sources, which explains the extreme difficulty of securing the ratification of a treaty in these days, and why it is so much easier for the one-third to prevent ratification than it is for the two-thirds to secure it. Lest it be said that this is a criticism of the Constitution, it may be frankly answered that it is nothing of the kind; but it is a criticism of the assumption of the Senate, and it justifies the statement that the State Department is always hampered by the ball and chain of the Senate.

The desire of the Senate to leave its impress upon all treaties is shown by trivial and absurd amendments, "the customary disfigurement at the hands of the United States Senate," to use Mr. Cleveland's vigorous language in discussing the Venezuelan settlement. Illustrative of what amounts almost to a mania, in recent years, on the part of the Senate to amend treaties, is the convention of 1896 with Great Britain for the settlement of claims arising out of the unlawful seizure by the United States of British vessels in Behring Sea. The convention as negotiated and signed by the plenipotentiaries of the contracting powers provided that "the commission may sit at San Francisco, California, as well as Victoria, provided it shall determine in any case that the interests of justice so require, due regard being had to the necessary expense and to all other considerations involved." The Senate, to make the language conform to its own ideas, changed the article to read: "The Committee shall also sit in San Francisco, California, as well as Victoria, provided that either Commissioner

shall so request, if he shall be of the opinion that the interests of justice shall so require, for reasons to be recorded on the minutes."

In 1883, a treaty was submitted to the Senate extending the life of a previously concluded convention with France for the adjustment of claims between the two countries. Defining the practice to be observed, the negotiators used these words: "If the proceedings of the Commission shall be interrupted by the death or incapacity of any one of the Commissioners," etc., which the Senate amended to read: "If the proceedings of the Commission shall be interrupted by the death, incapacity, retirement or cessation of the functions of any one of the Commissioners," etc.

An examination made by me of original treaties in the archives of the Department of State shows that, in the early days, the Senate exercised the right of amendment very sparingly and with great discretion, but of recent years, especially during the last decade, it has exerted its power with the greatest freedom, until now the treaty that is ratified without amendment is the exception.

What enables the oligarchs of the Senate to exercise their dominant power, to reduce the House to a legislative nonentity and to keep the President in subjection, is the peculiar code of the Senate, the unwritten code which is more powerful than the printed rules. The fear expressed by Hamilton, that a few of the members of the House by long experience and a mastery of public affairs would dominate their associates, finds its realization in the Senate. An *imperium in imperio* exists there. Despite the fact that all Senators are free and equal, that one man may be able to block business, and that "government by agreement" eliminates friction, all real authority is centered in a few hands; at the present time not more than half a dozen Senators have reached censorian dignity. The *Congressional Directory* of November 27th, 1900, a recent edition, gave the biographies of eighty-five Senators, there being five vacancies at that time. Of the total number, forty-eight were then serving their first term, nineteen their second, six their third, eight their fourth, and four their fifth; but even these figures are misleading, as some of the men credited with two terms have not seen six years of service; they were appointed to fill vacancies and then elected for a full term. But taking the figures as they stand, nearly eighty per

cent. of the Senate has served less than twelve years and twenty per cent. more.

In the Senate authority comes with length of service. A new Senator is placed at the foot of unimportant committees, no matter how long his experience in public life or his standing in the House of Representatives or elsewhere (Mr. Carlisle was one of the rare exceptions), and he can only reach a chairmanship of a leading committee by the retirement of Senators who outrank him. The system is so automatic that it is almost military in its operation. No matter how brilliant the attainments of a captain, he must bow to the superior wisdom of a colonel or a general. A Webster entering the Senate to-day would perforce sit at the foot of the table and find it futile to try and oppose the chairman; and a Webster would find himself on a committee of minor importance, while men his intellectual inferiors and his juniors in years, but his seniors in service, would be members of great committees. By this method power always centers in the hands of a few men, the half dozen or so Senators who are at the head of the few really important committees. No legislation can be enacted, no policy can be put into execution, unless these men are first consulted and give their consent. They are, in effect, the Senate of the United States.

At the beginning of this article was used one of Bismarck's favorite maxims. Perhaps it may not be inappropriate to close with the remark made by the Iron Chancellor when discussing the terms of peace with France, an observation that the Senate might remember with profit: *"La patrie veut être servie, et non pas dominée."*

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